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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1025

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 23, 1964.

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[1] The petitioner not identified in the caption herein above is George H. Coates, an individual. The fourth respondent is Long Island Lighting Company.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia is not yet reported. It is reprinted in Appendix B hereto, *infra*, pp. 10a-25a. The opinion of the Federal Power Commission (R. 9723-9760), which was reviewed by the Court of Appeals, is reported in 28 F.P.C. 401 (1962) and is reprinted in Appendix C hereto, *infra*, pp. 26a-81a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1964 (R. 749). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has the power, by attachment of condition to certificates of public convenience and necessity granted under Section 7 of the Natural Gas Act, to order reparations of amounts received from the sale of gas under temporary certificates which did not contain conditions for possible refunds.

STATUTE INVOLVED

The statutory provisions involved are contained in Sections 4, 5, and 7 of the Natural Gas Act, 52 Stat. 822 (1938), as amended, 15 U.S.C. §§ 717c, 717d, and 717f. These Sections are printed in Appendix A, *infra*, pp. 1a-9a.

STATEMENT

The Commission's opinion under review granted certificates of public convenience and necessity to each Petitioner authorizing it to sell natural gas to South Texas Natural Gas Gathering Company (South Tex-

as) (R. 9723-9760). These certificates conditioned the price which could be charged prospectively to 15.0 cents per thousand cubic feet (Mcf) (R. 9754). The Commission refused to require reparations of amounts which had been collected pursuant to the filed rate schedules and in accordance with temporary certificates which contained no conditions providing for possibility of refunds (R. 9742). However, the court below held that the Commission can order such reparations and remanded for a determination of the "equitable factors" involved. Petitioners challenge the Commission's power to order reparations in these circumstances.

In February, 1959, South Texas entered into a contract with Transcontinental Gas Pipe Line Corporation, an interstate pipeline company, agreeing to provide 150,000 Mcf of natural gas per day for delivery in LaSalle County in southern Texas. The initial phase of this project was to provide 50,000 Mcf per day, commencing in December, 1959 (R. 6653), with deliveries increasing in annual increments of 50,000 Mcf per day in December, 1960, and December, 1961 (R. 9729).

Petitioners were among forty-nine producers which contracted with South Texas for the sale of natural gas produced in Texas Railroad District No. 4 to enable South Texas to meet the first 50,000 Mcf daily requirement.[2] Producer prices ranged from 9 to 17 cents per Mcf (R. 8525). Each Petitioner entered into a gas sales contract providing, among other things, for a rate of 16.0 cents per Mcf.

[2] Sunray DX Oil Company, one of the Petitioners herein, contracted with South Texas at a later date. Its gas was included in the second increment of 50,000 Mcf.

Petitioners and other producers filed applications with the Commission seeking permanent certificates of public convenience and necessity authorizing their sales under Section 7 of the Natural Gas Act. Because of excessive delay attendant with processing producer applications and resulting irreparable loss, Petitioners requested temporary certificates so that their sales could begin pending action upon the permanent certificates.

The Commission issued temporary certificates to Petitioners authorizing them to begin their sales to South Texas at their contract rates of 16.0 cents per Mcf (R. 7918, 7922, 7934, 8111, 8267).[3] During this period the Commission also issued temporary certificates to the other producers. The temporary certificates granted to Petitioners were in the standard form issued by the Commission known as "non-conditioned" or "unconditional" temporary certificates, as distinguished from "conditioned" temporary certificates in which the Commission includes express provisions for possible refunds of amounts collected pending action on the "permanent" certificates (See *e.g.*, R. 7918, 7922, 7934, 8111).[4]

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[3] The temporary certificate initially tendered to Skelly Oil Company was revoked by letter of November 12, 1959, because Skelly, being unable to begin deliveries immediately, had not requested a temporary certificate (R. 7934). However, later, before issuance of the Commission's final order, Skelly applied for and received a non-conditioned temporary certificate and began sales thereunder (R. 9250-9262, 9423).

[4] In the opinion under review, the Commission expressly found that the temporary certificates issued to Petitioners "did not require nor suggest a refund." (R. 10013.) For a further discussion of types of temporary certificates issued by the Commission see *infra*, pp. 14-15, 23.

Petitioners began deliveries under their filed rate schedules pursuant to their non-conditioned temporary certificates. Hearings on the applications for permanent certificates began March 7, 1960; an examiner's decision authorizing all the producer sales in the first phase at contract rates was issued September 8, 1960 (R. 8512-8532), and the Commission affirmed the examiner by order issued November 22, 1960 (R. 8746-8759).

On December 22, 1960, the Respondent, Public Service Commission of State of New York (PSC), applied for rehearing contesting the 16.0-cent price at which the Commission had authorized Petitioners' sales in the permanent certificates, but making no contention for reparations of amounts collected pursuant to the non-conditioned temporary certificates (R. 8816, 8831). On January 19, 1961, the Commission granted rehearing on the question of rate level for the permanent certificates (R. 8938-8939).

During the period while hearings were being held on producer applications for this first phase of the South Texas project, thirty-six additional producers had filed applications for sales to South Texas to supply gas for the second phase at prices equal to or less than the 18-cent area guideline announced in the Commission Statement of General Policy No. 61-1 (R. 9729-9732). As noted above, *supra*, p. 3 n. 2, sunray's sale was included in this group. South Texas proposed to utilize this additional gas in satisfaction of the second phase of its project (R. 9729).

At this juncture, it should be noted that during this period while final action on the permanent certificates was pending, the Commission, in its Statement of Gen-

eral Policy No. 61-1, issued on September 28, 1960, contemporaneously with its *Phillips Petroleum Co.*, Opinion No. 338 (24 F.P.C. 537), had announced an 18-cent guideline price level at which it would certificate producer prices in Texas Railroad District No. 4, the area involved. In announcing its guideline prices the Commission stated its purpose, as follows (24 F.P.C. 818):

> "[to] serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended."

The Commission granted temporary certificates to the additional producers whose gas would comprise the second 50,000 Mcf increment for South Texas and held hearings upon their applications concurrently with the rehearing on applications which comprised the first phase. An examiner's decision on the consolidated first and second phases, issued January 25, 1962 (R. 9474-9503), granted permanent certificates to Petitioner for their sales at their contract rate levels.[5] No reparations were ordered (R. 9500-9503). Exceptions were taken by PSC, The United Gas Improvement Co. (UGI) and Long Island Lighting Co. (LIL), to certification of the rate levels, but no question was raised

[5] This Court had occasion to consider the effect of the Commission's Statement of General Policy No. 61-1 and the guideline prices there enumerated when reviewing the *Phillips* opinion. See *Wisconsin* v. *F.P.C.*, 373 U.S. 294, 298-299 (1963).

[6] The examiner would have reduced the rate chargeable by one of the producers whose case is not here on review. Disapproval of the initial price was not based upon the level of the rate but because of affiliation between buyer and seller (R. 9497).

as to reparations of amounts collected during pendency of the non-conditioned temporary certificates (R. 9576-9589, 9649-9658).

On August 30, 1962, the Commission issued its Opinion No. 362 (R. 9723-9760). In that opinion it reversed its previous position taken in its order of November 22, 1960, and reduced the level of initial prices chargeable prospectively under the producers' permanent certificates to 15 cents per Mcf (R. 9754). Directing its attention to the validity of the rates collected during pendency of the temporary certificates, the Commission held (R. 9742):

> "... Under these circumstances we believe that there is no basis for ordering refunds for the period, prior to the effective date of the permanent certificates being issued herewith, during which the producers were receiving the higher prices unconditionally authorized in their temporary certificates."

Upon applications for rehearing filed by PSC, UGI, and LIL, the Commission affirmed its refusal to order reparations adding as an additional reason therefor (R. 10013-10014):

> "... The essence of our conclusion on this point is that it would be inequitable to require the producers to make refunds where they were issued temporary certificates in general language without specific provision for refunds. They undertook service thereby, binding themselves to deliver gas until relieved by us under a certificate that *did not require nor suggest a refund.* * * *.
>
> "A refund has been required when the permanently certificated rate is less than the temporary one but in such a case specific language advising the parties of the risk they took if they accepted

the temporary certificate has *uniformly* been used. Since in the present proceeding there is no such provision in the temporary certificates to proceed now and order the producers to make refunds would not be equitable regardless of any ultimate right we may have to order such refunds." [Emphasis supplied.]

On review, the court below concluded, despite the absence of conditions providing for possible refunds in the temporary certificates that the Commission has power, when issuing permanent certificates, to condition the permanent certificates to require reparations of amounts collected pursuant to the non-conditioned temporary certificates (*infra*, p. 23a).

REASONS FOR GRANTING WRIT

1. Decision Below Conflicts With Principles Announced By This Court

The holding of the court below that the Commission has the power to order reparations of amounts collected pursuant to non-conditioned temporary certificates is in direct conflict with the holdings of this Court that the Commission has no reparations power. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951); *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *T.I.M.E., Incorporated* v. *United States*, 359 U.S. 464, 470-471, 474-475 (1959).[7] The lower court's holding that the Commission has power to fix rates retroactively when issuing a permanent certificate is contrary to this

[7] It is well established that the Commission's rate powers under the Federal Power Act "are substantially identical to" its rate powers under the Natural Gas Act. *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 350-351 (1956).

Court's determination in *Atlantic Refining Co., et al. v. Public Service Commission of State of New York*, 360 U.S. 378, 392 (1959) that the Commission does not have such power.

In concluding that the Commission has the power to order reparations the Court of Appeals would thwart the definitive holding of this Court in *Montana-Dakota* that the Commission does not have reparations power for this Court there held (341 U.S. at 254):

> "The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent."

"S. Rep. No. 621, 74th Cong., 1st Sess. 20."

Plainly, the Court's decision below would grant the Commission power to order reparations even though Congress withheld such power from the Natural Gas Act.

Moreover, the decision of the court below enabling the Commission to grant reparations would contradict this Court's holding in *Montana-Dakota* that (341 U.S. at 251):

> "[a purchaser] can claim no rate as a legal right that is other than the filed rate, whether fixed or *merely accepted* by the Commission, and not even a court can authorize commerce in the commodity on other terms." [Emphasis supplied].

In this connection there can be no doubt that Petitioners' 16.0-cent rates were "accepted by the Commis-

sion" for the Commission expressly so stated in its letter orders granting temporary certificates. (See, *e.g.* R. 8111.)

After issuance of the non-conditioned temporary certificates and acceptance of Petitioners' rate schedules for filing Petitioners instituted service and collected their contract rates of 16.0 cents per Mcf. They continued to collect their filed rates, without contingency for refund, or even any notice that a contention for reparations might be made, until after the issuance of the permanent certificates in the Commission's Opinion No. 362 which is the genesis of this review. For the period of the effectiveness of the non-conditioned temporary certificates, Petitioners' filed rates were the legal rates for which "not even a court can authorize" sales on other terms (*Ibid*).

The court's opinion below also conflicts with this Court's decision in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) where this Court stated (at 618):

> "It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'"

If any question as to lack of power to order reparations remained, it was conclusively dispelled in *T.I.M.E., Incorporated* v. *United States*, 359 U.S. 464, 469-471 (1959) where this Court held (at 470):

> "The structure and history of Part II (the Motor Carrier Act), however, lead to the conclusion that here, as in the Federal Power Act, Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert 'unreason-

ableness' as a defense in carrier suits to recover applicable tariff rates."

Having in mind that the Commission expressly found (R. 1001;3) that the temporary certificates did not contain price conditions, the contentions of PSC, PGI, and LIL in their petitions for review that the Commission should have ordered refunds constituted nothing more than an indirect suit for reparations despite the fact that such an avenue is foreclosed to them by the Natural Gas Act.

Respondents gain no support because this review proceeding arose under Section 7 for that Section does not clothe the Commission with power which has been consistently denied to it. In the words of this Court in the *T.I.M.E.* case (359 U.S. at 475):

> "To permit a utilization of the procedure here sought by the Government would be to engage in the very 'improvisation' against which this Court cautioned in Montana-Dakota, supra, in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly."

In any event, this Court in its definitive opinion in *Atlantic Refining Co., et al.* v. *Public Service Commission of State of New York*, 360 U.S. 378 (1959), delineated the Commission's conditioning power under Section 7 of the Act making it clear that the Commission has no power under that Section to fix or overturn contract rates. Thus, this Court emphasized (360 U.S. at 391-392):

> "This [the conditioning power] is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act,

> United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra, but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. *In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties.*" [Emphasis supplied.]

Such power to prescribe conditions under which service may be rendered in the future, as distinguished from fixing rates, gives effect to the "single statutory scheme under which all rates are established initially by the natural gas companies." *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956). Further, as this Court noted in the *Atlantic* case, the Commission "was not given power to suspend rates under § 7," and under Section 5, the rate fixing provision of the Act, the Commission's power is prospective only (360 U.S. 389-390).

As recently as March 30, 1964, this Court again passed upon this question of the lack of Commission power to fix or overturn rates in a certificate proceeding. Thus, in *F.P.C.* v. *Hunt*, ___ U.S. ___, No. 273, October Term 1963, this Court held that the Commission's rate-fixing power resides in Sections 4 and 5 of the Act, and that the certification procedure under Section 7 "to lay down conditions precedent to entry of natural gas into interstate commerce" does not impair the vitality of the rate provisions of Sections 4 and 5 (slip opinion, pp. 8-12). On the contrary, "under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the [rate]

provisions of [the Act] become applicable." (Slip opinion, p. 9.)

Since Petitioners here sold their gas under unconditional temporary certificates, the procedures of the Act require that only Sections 4 or 5 could be invoked to change Petitioners' rates. And these Sections deny the Commission power to order reparations. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; F.P.C.* v. *Hope Natural Gas Co., supra.*

In contrast, the action of the court below would grant to the Commission precisely the power which this Court held to be absent from Section 7. For the lower court would, through a condition to a certificate, *infra*, p. 23a, authorize the Commission to overturn and fix Petitioners' initial prices established by contract, accepted for filing by the Commission, and collected under non-conditioned temporary certificates by Petitioners.

This petition presents a case of first impression. In the ten years since regulation of independent producers began with *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) the Commission has never asserted the power to order reparations of any amount collected pursuant to non-conditioned temporary certificates (R. 10014). Nor has any contention been made for such reparations. Until this proceeding, no court has ever held that the Commission has such reparations power. These circumstances clearly impel this Court to grant this petition for *certiorari* to correct the error in the lower court's opinion.

2. Decision Below Conflicts With Decisions in Other Circuits

In addition to the direct conflict with the principle that the Commission has no reparations power, the decision below is incompatible with decisions of other circuits, particularly *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 270 F.2d 404 (10th Cir. 1959) and *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F.2d 771 (3rd Cir. 1956). Indeed, the court below admits that its decision is in conflict with the Tenth Circuit's decision in the *Sunray* case (*infra*, p. 24a). Unless this conflict is resolved, administration of the Natural Gas Act and the rights and obligations of the parties thereunder will vary from case to case depending upon which court of appeals has review jurisdiction.

In the *Sunray* case the Commission had tendered to Sunray a temporary certificate permitting collection of the contract rate. However, the temporary certificate contained a price condition providing for refunds of indefinite amounts to be later determined based upon the rate to be made applicable under the permanent certificate. In parlance of Commission practice this was known as a "floorless" condition, because there was no stated minimum below which refunds could not be required.[8] In striking down this "floor-

[8] In cases where the contract rate exceeds the Commission's guideline price the Commission customarily issues temporary certificates with conditions providing for possible refunds down to a stated minimum. In other cases where the proposed price exceeds the guideline price, conditions provide for an immediate reduction in the rate before service begins with no provision for refunds of amounts collected pursuant to the temporary certificate. None of these conditions was attached to temporary certificates issued in the consolidated proceedings before the Commission which were reviewed by the court below.

less" condition the court in the *Sunray* case held (270 F.2d at 409):

> "The Act contemplates that the Commission need not accept the conditions contained in an application, Sunray Mid-Continent Oil Co. v. Federal Power Commission, supra; it likewise contemplates that the applicant need not accept conditions imposed by the Commission in its initial acceptance. Where conditions are imposed by the Commission the applicant has the free choice to accept or reject; to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond.'"

The conflict between circuits is plain. The court below has told the Commission that every non-conditioned certificate may be construed—retroactively—as having contained, in fact, a "floorless" price condition.[9] Yet, the *Sunray* case holds such a condition to be invalid.[10]

In *Sunray* the court aptly described and properly voided the Commission's action taken before gas was committed to the interstate market and at a time when

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[9] Compare the Commission's finding that the temporary certificates did "not require nor suggest a refund" (R. 10013).

[10] Since issuance of the *Sunray* opinion the Commission has ceased granting temporary certificates with "floorless" price conditions. When price has been a question it has attached definite conditions with a refund floor or reduced the price before service begins.

the producer may have had some freedom of choice (270 F.2d at 409-410):

> "... In the instant case no initial rate is accepted. None is rejected. The applicant is merely asked to speculate as to what the ultimate temporary rate may be, to rely on the ultimate fairness of the final determination, and to meanwhile dedicate its gas to public service. The action of the Commission is neither an acceptance, rejection nor proper conditional acceptance of Sunray's application. It merely purports to hold in abeyance potential conditions. Under such circumstances Sunray is denied its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part."

A brief analysis reveals that the lower court's decision does not even offer Petitioners the circumscribed choice held invalid in *Sunray*. At the time Petitioners committed their gas under the non-conditioned temporary certificates they had no inkling that they might be required to make any reparations.[11] They had been led to believe, before they committed their gas to the interstate market, that their collections under the non-conditioned temporary certificates were not subject to any condition for possible refunds (R. 9742, 10013-10014). At least, when the producer was tendered the

[11] Contrary to the implication in the footnote on page 16 of the court's opinion below (*infra*, p. 24a), Petitioners were not "relatively assured of being able to sell their gas without risk of subsequent refund at a price of 14.6 cents per Mcf." PSC and other intervenors did not urge 14.6 cents as a proper "in-line" price until after hearings had been completed and long after Petitioners had committed the sales under the non-conditioned certificates. Furthermore, the contentions of an adversary party, such as a private distribution utility, cannot be taken as an appropriate measure of the requirements of the public convenience and necessity.

invalid temporary certificate containing a "floorless" condition in the *Sunray* case, it was apprised of a possible, though indefinite, refund requirement.

Paraphrasing from the *Sunray* opinion, *supra*, the net effect of the decision below is to say to producers seeking temporary certificates at prices equal to or below the Commission's guideline price levels, "You may sell your gas at your contract rate. Since your price is within the guideline price for the area no condition for refunds is attached to your temporary certificates." Then, after the producers have committed their gas to the interstate sale on the authority of the non-conditioned temporary certificates, the Commission may, according to the court below, by a condition in the certificate order prescribing the terms and conditions of the sale for the future, retroactively revise the non-conditioned temporary certificates saying, "We have now decided that your past rates which were accepted for filing should be retroactively reduced."

Parenthetically, it should be noted that the 16.0-cent rate level collected by Petitioners under their non-conditioned temporary certificates has recently been determined by the Commission to be the price level at which permanent certificates will be issued in the area *Amerada Petroleum Corp., et al.*, Docket Nos. CI62-1544, *et al.*, Opinion No. 422 issued March 23, 1964.

The holding of the court below not only conflicts with the Tenth Circuit's determination that issuance of a temporary certificate with a "floorless" price condition is beyond the Commission's power but it also conflicts with the decision of the Court of Appeals for the Third Circuit in *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F.2d 771, 773 (3rd Cir. 1956), *cert. denied*, 353 U.S.

923 (1957). In that case, like this, the Commission had issued a non-conditioned temporary certificate. Pursuant thereto deliveries began at the contract rate of 12 cents per Mcf. After hearing the Commission issued a certificate limiting the rate to be charged prospectively to 10 cents per Mcf. Upon review, Signal claimed that the Commission could not change the rate to be charged prospectively without a hearing under Section 5—the rate section of the Act. It argued that since the Commission had accepted the 12.0-cent rate for filing in connection with the non-conditioned temporary certificate, that rate became the legally effective rate which the Commission was powerless to change prospectively through the attachment of a condition in the permanent certificate.

In rejecting Signal's contention as to the Commission's power to limit the collection of future rates the court held (238 F.2d at 773):

> ". . . Signal makes much of the proposition that its rate filed at the time it asked for the emergency certificate has 'become invested with a compelling and decisive legal significance.' It says that this rate 'is the effective rate governing petitioner's sale. It is the only legal rate.' *This statement is true in so far as it means that no other rate could have been charged while the temporary certificate was in effect.* Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 1951, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912. But it is quite another thing to say that by accepting the filing of the rate schedule when it granted the temporary certificate the Commission precluded itself from exercising any conditioning power it had under Section 7(e). Cf. Panhandle Eastern Pipe Line Co. v. F.P.C. 3 Cir., 1956, 232 F.2d 467, note 5; Alabama Tennessee Natural Gas Co. v. F.P.C. 3 Cir., 1953, 203 F.2d 494." [Emphasis supplied.]

Expressly recognizing that the Commission had no reparations power with respect to the legal rate on file and collected by Signal under its temporary certificate, the court limited the legal effectiveness of the 12-cent rate to the period of the temporary certificate. In contrast, if the rationale of the court below were to be applied, the filed rate collected under non-conditioned temporary certificates would not be the legal rate. Instead, some other rate might be charged—retroactively. Compare the holding of the court below with the holding of the Court of Appeals for the Fourth Circuit in *Hope Natural Gas Co.* v. *F.P.C.*, 196 F.2d 803 at 805 (1952) where the Fourth Circuit would not permit reparations for the benefit of the seller and forbade any deviation from the filed rate stating (196 F.2d at 805):

> "The Commission is given no power to enter reparations orders with respect to rates."

Plainly, the decision of the court below cannot stand side by side with the *Sunray*, *Signal*, and *Hope* opinions. The Court should grant certiorari to resolve this conflict.

3. Decision Below Presents a Question of Major Importance in Administration of the Natural Gas Act

If the court's decision below investing the Commission with reparations power were permitted to stand, the impact upon administration of the Natural Gas Act and the entire natural gas industry would be far-reaching. Long established Commission regulations and policies are founded upon the fact that the Natural Gas Act gives the Commission no reparations power. Indeed, a cornerstone of producer regulation—expeditious authorization of service under ascertainable con-

ditions—would be jeopardized. *Cf., F.P.C.* v. *Hunt*, No. 273, October Term 1963, decided March 30, 1964, slip opinion, pp. 12-13.

Not only would producers be subject to the uncertainty attendant with reparations, since the measure of such reparations must be essentially unknown at the time producers must decide whether or not to commit their gas, but also the Commission's whole area pricing policy is endangered. New projects such as that proposed by South Texas in these proceedings would be faced with an almost insuperable obstacle—extended delay in attachment of new supplies necessary to begin operations. Indeed, it is doubtful that the volumes of gas involved in the proceedings could have been marketed by South Texas in the absence of an ability under the temporary certificate procedure to attach new supplies without delay.

Early in producer regulation it became apparent that expeditious action on applications for certificates was essential in order that producers might be authorized to begin service without delay. Such action is essential not only to assure adequate supplies for consumers at the time such supplies are needed but also to give effect to the practical necessities of the production industry. Commission regulation through issuance of temporary certificates to independent producers has attempted to take cognizance of these needs while, at the same time, providing price protection through attachment of price conditions when appropriate.

Thus, when a producer files its application it has already executed a gas sales contract with a pipeline purchaser and, in most instances, stands ready to be-

gin service immediately. In fact, there are potent economic forces which require almost immediate Commission action. Recognizing that the public interest requires quick action on producer requests for temporary certificates the Commission adopted Section 157.28 to its Regulations which provides in part, as follows:

> "(e) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported."

By the time a producer seeks a temporary certificate it has already invested substantial sums of money, as a lessee under its oil and gas lease, exploring for and developing the reserves (R. 1324-1334). Unless a producer can be assured of reasonably prompt commencement of deliveries, its investment may be jeopardized through drainage from adjacent properties. In other cases the producer may be faced with possible loss of its lease and consequent total loss of its investment if deliveries are not begun without delay. In instances where gas is produced in conjunction with oil the producer may be forced to flare its gas pending authorization to begin the sale. Further, the producer may be

obligated to make substantial shut-in royalty payments if deliveries are not begun by a certain date.

In the decade of producer regulation the Commission has issued many thousands of temporary certificates to meet and alleviate these emergency conditions. It has, however, attempted to fit this phase of its regulation into its overall scheme of administration of the Act. Thus, when the Commission issued its Statement of General Policy No. 61-1 announcing guideline prices at which it would certificate producer sales in the several producing areas throughout the country it stated [24 F.P.C. 818 (1960)]:

> "This statement establishing rate standards for independent producers of natural gas is issued on our own motion and is based on our experience gained after six years of regulation of independent producers under the Natural Gas Act. By this statement and the appended area price schedules we will set standards for initial and increased rate filings by producers for the sale of natural gas into interstate commerce. These standards will serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended.
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> "* * * It is essential, particularly in the interest of the consumer for whose protection the statute was enacted, that means be found for making the most effective use possible of the Commission's limited facilities in discharging the new and additional duties called for by the regulation of producers of natural gas. In our opinion, the price standards established by this statement will aid in effectively applying the provisions of the Act to independent producers on a simple, clear and

administratively feasible basis, and in a manner fair to all whose interests are affected by Commission regulation. Our many reasons for establishing these maximum acceptable rates as opposed to establishing rates based on a full cost-rate base hearing for every rate filing made by producers are set forth at considerable length in our opinion No. 338, *Phillips Petroleum Co.*, Docket No. G-1148, et al., pp. 5 thru 12, issued on this date."

In keeping with the guideline prices, which have been revised by the Commission from time to time, temporary certificates requesting authorization to make sales at or below guideline levels are granted without price condition. If a proposed price should exceed the applicable guideline price the Commission attaches a price condition to the temporary certificate making the amounts collected in excess of the guideline price subject to possible refund. In some cases, when it appears that the proposed price might have an immediately disruptive effect upon the existing price structure in the area, the Commission may condition the temporary certificate to provide an initial rate no higher than the guideline price.

By use of the foregoing procedure all parties, seller, buyer, interested third parties, and consumers are apprised of their respective rights and obligations and enter into commitments or seek administrative relief with full knowledge thereof. The Commission is able to process thousands of applications with the rapidity that is necessary both to meet the emergency needs of the industry and to assure adequate supplies of gas at fair prices.

Utilization of guideline prices in issuance of temporary certificates is correlative to the Commission's at-

tempt to regulate producer rates on an area basis instead of an individual cost-of-service method. As this Court is aware, the Commission is striving to hammer out a workable method of producer regulation which will avoid individual cost-of-service determinations which the Commission has found to be administratively impracticable. *Wisconsin* v. *F.P.C.*, 373 U.S. 294, 298-299 (1963).

This Court has pointedly recognized this problem in *F.P.C.* v. *Hunt*, No. 273, October Term 1963, where it stated with regard to delays incident to issuance of certificates (slip opinion pp. 12-13):

> "The Commission has been making efforts in this regard, through the establishment of guidelines for determining initial prices and other administrative devices. 43 F.P.C. Ann.Rep. 13, 119-120 (1963). However, we again call to its attention the dangers inherent in the accumulation of a large backlog of cases with its accompanying irreparable injury to the parties. Moreover, consumers may become directly affected thereby through the reluctance of producers to enter interstate markets because of the long delay incident to permanent certification. Procedures must be worked out, not only to clear up this docket congestion, but also, to maintain a reasonably clear current docket so that hearings may be had without inordinate delay."

The lower court's reparations decision would strike at the heart of all that the Commission has been seeking to accomplish. It is obvious that if producers are going to be subjected to proof of "equitable factors" in order to avoid reparations, one essential element of such proof—adjudication of past rates—is a determination of costs. Negating a basic purpose of the Act

every certificate proceeding where reparations are possible will, of necessity, be converted into a cost-of-service rate case in order that rates collected under the temporary certificates may be properly adjudicated. *Atlantic Refining Co., et al.* v. *Public Service Commission of State of New York*, 360 U.S. 378, 390-391 (1959).

From the point of view of the regulated industry this novel reparations power would have extremely serious effects. Producers would be subjected to the possibility of heavy reparations despite the fact, as was true here, that their filed rates corresponded with or were less than the Commission's area guideline price. There would be no certainty as to how much of the revenues collected under non-conditioned temporary certificates would later become subject to reparation. Yet, numerous substantial costs incurred by producers during the pendency of the temporary certificates are based upon the filed rates.

For example, State taxes are imposed upon the basis of the effective filed rates. These taxes are collected and no effective means of recoupment is available if the Commission were retroactively to fix lower rates. Additionally, producers must make payments to numerous royalty owners on the basis of their filed rates and here again, the possibility of recoupment is remote. These factors are real considerations which would confront every producer. Development of many gas prospects would be indefinitely delayed to the ultimate detriment of consumers who are dependent upon continual development of new reserves. *F.P.C.* v. *Hunt*, *supra*, slip opinion pp. 12-13.

Moreover, the mere assertion of the power to order reparations in this case vitally affects Petitioners.

Revenues which had been considered definite and consequently have been committed elsewhere have suddenly become subject to refund even though they are beyond recall. And any hearings held to determine costs of producing the gas sold under the temporary certificates would necessarily be prolonged and expensive. Petitioners should not be required to assume the burden of these substantial expenses when it is clear that the Commission has no power to order reparations in any event.

The immediate impact of the decision of the court below both upon administration of the Natural Gas Act and upon parties affected thereby is clearly demonstrable. For example, the Commission has recently scheduled for hearing two cases involving many consolidated producer applications. See, *Sinclair Oil and Gas Co., et al.*, Docket Nos. G-16760, *et al.*, order issued March 25, 1964, and *H. L. Hawkins, et al.*, Docket Nos. G-18077, *et al.*, order issued March 30, 1964. Further, the Commission has held open the consolidated certificate proceedings in *Amerada Petroleum Corp., supra*, p. 17, for the express purpose of determining whether reparations should be ordered with respect to filed rates collected pursuant to non-conditioned temporary certificates. *Amerada Petroleum Corp., et al.*, Docket Nos. CI62-1544, *et al.*, Opinion No. 422, p. 21. In the *Hawkins* order, as in the *Amerada* opinion, the Commission noted that many of the producers had received non-conditioned temporary certificates. These additional hearings, to the extent they relate to the question of what, if any, reparations should be ordered, are a direct consequence of the lower court's holding that the Commission has reparations power.

There are numerous other producer sales currently being made pursuant to non-conditioned temporary certificates. If producers are now to be subject to reparations of amounts already collected without refund contingency, due process would dictate that they be permitted to present cost evidence to justify their filed rates. Necessarily, producer certificate cases will assume the nature of rate proceedings. A major objective of the Commission's area pricing approach will be defeated and administration of producer certificate procedures under Section 7 of the Act will be frustrated.

CONCLUSION

For the foregoing reasons, it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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